BLOGGERS' RIGHTS AND WRONGS: California Offers Some Protection to Bloggers From Adverse Employment Actions – But There Are Limits

By Deborah F. Brown

With the arrival of new software in the past few years that enables even those lacking technical expertise to publish a blog, the online journals have proliferated at megaspeed. The term blog itself has been evolving rapidly; it began in 1997 as "web log,"[1] which described a kind of online public diary in which an early web user would provide links to, and commentary on, interesting web sites the poster had discovered. It is now generally applied to any web site sharing some of the characteristics of those early journals.[2] Athough it is impossible to arrive at a definitive number, one reasonable estimate would put the number at more than 118 million blogs in English as of April 2007.[3]

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[1] Rebecca Blood, Weblogs: A History and Perspective, Rebecca's Pocket, Sept. 7, 2000, http://www.rebeccablood.net/essays/weblog_history.html (quoting) John S. Hong, Comments, "Can Blogging and Employment Co-Exist?, 41 U.S.F. L.Rev 445, 447 (2007).
[2] O'Grady v. Superior Court, 139 Cal. App.4th 1423, 1464, n. 21 (2006).
[3] Anne Hammond, How Many Blogs Are There? Is Anyone Still Counting?, http://www.blogherald.com/2008/02/11/how-many-blogs-are-there-is-someone-still-counting/ (February 11, 2008) (last visited July 29, 2008).

Legal problems related to blogs have proliferated almost as quickly as the blogs themselves. The host of issues has included cases involving free speech, defamation, copyright and trademark infringement, privacy and the disclosure of trade secrets. Inevitably, the blogosphere and the employment sphere have collided in many cases. Usually, the result of those collisions is that the employee/blogger loses his or her job.

Employees have been fired for blogs for all kinds of content from the personal to the political.[4] Judging from their postings, non-lawyer bloggers often imagine that they have a "right to free speech" that permits them to spew any thought that crosses their heads into cyberspace and be insulated from any consequences. For example, when a Mercenary Audio, a Massachusetts company, terminated Drew Townson for blogging, one poster lamented online: "The first amendment has been rescinded at Mercenary Audio."[5]

At essence, the employment issue raised by blogs is a free speech issue. Ellen Simonetti,[6] who was fired by Delta Air Lines for her blog, which included racy photos of her posing in a flight attendant's uniform aboard a Delta jet,[7] has much in common with Michael A. Marsh, the plaintiff in *Marsh v. Delta Airlines*,[8] a 26-year Delta employee who was terminated for writing a letter to a newspaper that was critical of the airline's cost-cutting policies. Both have argued that they were engaged in lawful activities for

[4] A simple web search on Google.com on the words "fired for blogging" brought up 529,000 entries on July 29, 2008.
[5] Joho the Blog: An Entry From the Archives, http://www.hyperorg.com/blogger/mtarchive/fired_simply_for_having_a_blog_1.html (last visited July 29, 2008).
[6] The Issue: A Blog, A Flight Attendant, and a Firing, Business Week, July 15, 2008, available at http://www.businessweek.com/print/managing/content/july2008/ca20080715_178680.htm.
[7] The photos or web site did not identify Delta, which was referred to as Anonymous International Airline. Ellen Simonetti, Diary of a Human Being, http:www.queenofsky.journalspace.com.
[8] Marsh v. Delta Air Lines, 952 F-Supp. 1458 (1997). The case was based on a Colorado statute similar to Labor Code 96(k) (holding that Marsh had violated an implied duty of loyalty to his employer by writing the letter).

which they should not have been terminated. Marsh was unsuccessful in persuading the court; Simonetti, who has become one of the web's better-known crusaders for "bloggers' rights," reports that her lawsuit is continuing.[9]

The nature of blogs differs from other means of communication in several significant ways. First, an employee who formerly might have complained about his boss to a half dozen listeners down at the bar or written to the local paper now may post the comments on his blog and enjoy hits from thousands of web surfers worldwide. Second, the cost of creating and maintaining a blog are minimal, and certainly less than creating other written communications such as handbills, newsletters and newspapers. Finally, although it is hard to quantify or prove, there is also a psychological difference. The web has a freewheeling culture in which "hyperbole and exaggeration are common, and 'venting' is at least as common and considered argumentation" and many posters behave as if "cyberspace is a frontier society free from the conventions and constraints that limit discourse in the real world."[10]

Those differences, however, do not alter the fact that a blog is a medium, not a message, and it is the content of the message itself that determines whether a blogger has protection under California's statutes. Content that is clearly defamatory to an employer or company employees or involves revelations of trade secrets or proprietary information will not be considered in this paper as the focus is on protecting bloggers engaged in lawful activities.

[9] Ellen Simonetti, http:www.queenofsky.journalspace.com; see also Wikipedia, http://en.wikipedia.org/wiki/Ellen_Simonetti

[10] Lyrissa Barnett Lidsky, Silencing John Doe: Defamation and Discourse in Cyberspace, 49 Duke L.J. 855, 863 (2000).

A California blogger pursuing a political agenda, or writing about efforts to promote union activities or changes in the conditions of employment would have the most protection from termination under California law, even if their postings conflict with the employer's interest. Bloggers writing about purely personal matters, who are likely to feel subjectively that they have a right to write about their personal affairs, are those who have the least protection, particularly if their comments can be seen in some way to reflect poorly on their employer.

At first blush, it might appear that a blogger who writes at home on his or her own equipment about any topic is protected under California Labor Code §96(k), which provides that the Labor Commissioner has the responsibility for handling all claims "for loss of wages as a result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises." Labor Code §96(a) provides that no one shall terminate or discriminate against an employee or applicant for engaging in any conduct "delineated in this chapter, including the conduct described in subdivision (k) of §96."

But case law has construed subdivision (k) narrowly. Soon after its passage in 2000, the Attorney General issued an opinion that § 96(k) "did not create any new substantive rights for employees," but instead was a procedural mechanism for the enforcement that allows the Labor Commissioner to assert the "independently recognized constitutional rights" on behalf of employees.[11] The courts have concurred, holding that its scope is limited to "lawful conduct occurring during nonworking hours away from the employer's premises" asserting "recognized constitutional rights" or violations of the

[11] 83 Ops. Cal. Atty. Gen. 226 (2000).

Labor Code.[12] Thus, courts have held that various lawful activities, including moonlighting,[13] dating another employee[14] and filing a lawsuit against an employer's client,[15] were unprotected.

Essentially, subdivision (k) provides the same protection as a claim for wrongful termination in violation of public policy, known commonly as a *Tameny* claim.[16] To support such a claim, a policy must be "delineated in either constitutional or statutory provisions"; it must be " 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual"; it must have been well-established "at the time of the discharge"; and it must be "fundamental" and "substantial."[17]

A blogger writing about political concerns can meet the tests of a *Tameny* claim. Firing an employee for political comments would violate the statutory prohibition of Labor Code §1101,[18] which prevents employers from adopting rules or policies that restrict their employees' political activities, and §1102,[19] which forbids employers from discharging, or threatening to discharge employees for their political activities. Both of these provisions are well-established, substantial and fundamental public polices, and the benefit of discussing political affairs inures to the public, not just the individual, because they serve the public's interest in being informed. The courts have recognized this use of

[12] Grinzi v. San Diego Hospice Corp., 120 Cal.App.4th 72, 86-87 (4 Dist. 2004)
[13] Hartt v. Sony Electronics Broadcasting & Professional Company, 69 Fed.App'x. 889 (2003), not citable but used for illustrative purposes.
[14] Barbee v. Household Finance Corp., 113 Cal.App.4th 525, (2003).
[15] Ester B. Jersey v. John Muir Medical Center et. al, 97 Cal.App.4th 814, (2002).
[16] Tameny v. Atlantic Richfield Co., 27 Cal.3d 167 (1980).
[17] Ross v. RagingWire, 420 Cal.4th 920, 925. (2008).
[18] Labor Code §1101(b) provides, in relevant part, that "No employer shall make, adopt, or enforce any rule, regulation, or policy" … "Controlling or directing, or tending to control or direct the political activities or affiliations of employees."
[19] Labor Code §1102 provides: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

these Labor Code sections, and have interpreted the statute as being intended to defend employees engaged in traditional political activity from reprisal by their employer.[20]

Similarly, public employees who blog about a matter of public concern, as long as their statements are not related to their official duties, have the protections of the *Pickering* balancing test.[21] The U.S. Supreme Court has acknowledged that the use of the *Pickering* test would be appropriate when a public employee speaks on a matter of public concern.[22] In such a situation, the court considers first whether the matter is one of public concern. Then, if it concludes that it is, it will weigh the employee's interest against the public employer's interest in promoting the efficiency of government services, using a variety of factors.[23] The public employer's interest might outweigh that of the employee if the speech caused actual, substantial disruption in the workplace, for example.[24] Federal government employees, however, might face special issues related to the Hatch Act, which prohibits federal employees from raising money for political candidates, among other provisions.[25]

The *Pickering* test has already been applied in a Ninth Circuit case involving a blog. In *Richerson v. Beckon*,[26] the court concluded that the blog by the employee, a teacher, had failed to meet the test of being about a matter of public concern. Although

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[20] Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 485 (1946); Smedley v. Capps, 820 F.Supp.1227, 1229, (1993).
[21] Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568.
[22] City of San Diego, Cal. v. Roe, 543 U.S. 77, 84, (2004) (holding that a police officer's off-duty activities in maintaining a web site that sold sexually explicit videotapes was not discussing a matter of public concern, and the speech was unprotected; thus, the *Pickering* test did not need to be employed.)
[23] Fazio v. City & County of San Francisco, 125 F.3d 1328 (1997). Guidance from the Ninth Circuit offers a number of factors to consider in the balancing process. They include the following inquiries: (a) does the speech impair discipline or control by superiors; (b) disrupt co-worker relations; (c) erode close working relationships premised on personal loyalty and confidentiality; (d) interfere with the speaker's performance of his or her duties; or (e) obstruct routine office operations.
[24] Chico Police Officers Association v. Chico, 232 Cal.App.3rd 635, 650.
[25] Elise Castelli, *Blogs, E-mails Land Feds in Trouble*, Federal Times, (March 09, 2008).
[26] Richerson v. Beckon, Slip Copy, 2008 WL 833076, 3 (W.D.Wash. 2008).

the court conceded that her blog could arguably be seen to address such a matter because it discussed the management of a public school, the court concluded that her "salacious mean-spirited comments,"[27] in which she disparaged and ridiculed her coworkers, had "far exceeded the normal standards of decency" and had no relevance to the issue of public concern.[28] The adverse employment action the plaintiff suffered, of being transferred to another job, was warranted, the court said. In fact, the court implied a termination would not have been out of line.[29]

Bloggers who comment on their workplace, however, in a more appropriate tone, also could successfully pass the *Tameny* tests by relying on appropriate sections of the Labor Code as the fundamental, substantial public policies violated by their termination or other adverse employment action. The courts have held that it was tortious to fire an employee because he was engaging in union activities.[30] Not only does the California Labor Code explicitly provide an employee the right to engage in such conduct, but it makes clear that public policy precludes employers from interfering with that right. Since 1937, Labor Code §923 has declared the public policy of California to recognize "that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor ... in self-organization or in other concerted activities for the purpose of collective bargaining ... ." Moreover, Labor Code §922 makes it a misdemeanor for any person to coerce another not to join a labor organization "as a condition of securing

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[27] *Ibid.*
[28] *Id.* at p. 4.
[29] *Ibid.*
[30] Wetherton v. Growers Farm Labor Assn., 275 Cal.App.2d 168 (1969), overruled on other grounds in Applied Equipment Corp. v Saudi Arabia Ltd, 7 Cal.4th504, (1994).

employment or continuing in the employment of any such person." [31] An employer discharging an employee for blogging about wages, hours and terms and conditions of employments also would likely be found to have engaged in an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act.

Labor Code § 1102.5 protects employees who disclose information to government or law enforcement agencies for the purposes of whistle-blowing, and courts have acknowledged that fundamental public policy prohibits the retaliatory discharge of employees for these activities.[32] If an employee were describing activities that met the statute's criteria for whistle-blowing, the blog reports would be protected.

When the blog is of a personal nature, however, California law offers far less protection to the blogger. In some cases firings by employers for personal blogs written on the employee's own time and own equipment about topics that are unconnected to the blogger's employment appear to be arbitrary and unreasonable as in the case of Drew Townson of Mercenary Audio, who contends that he was terminated over a blog written off-duty that showed photos of his baby.[33] In other cases, like that of Heather B. Hamilton, who was fired in 2001 for blogging about her workplace and fellow employees,[34] or that of the teacher in *Richerson*, it's much easier to see that there can be an adverse impact on the employer, either through the disruption of workplace harmony or in the creation of negative impressions about his business. But whether or not the

[31] Jersey v. John Muir, *supra* at n. 15, 97 Cal. App. 4th at p. 831.
[32] Foley v. Interactive Data Corp., 47 Cal.3d 654, 670-671, (1988); Colores v. Board of Trustees 105 Cal.App.4th 1293, 1301, n. 1 (App. 2 Dist. 2003).
[33] The employer disputes Townson's claim that the posts were made on Townson's own time, and also contends that there was a conflict because Townson's postings included discussions of sound equipment even though the blog did not mention the company name. Both sides are documented by John Cass, PR Communications, http://pr.typepad.com/pr_communications/2007/03/mercenary_blogg.html (last visited July 29, 2008). Although the Townson and Armstrong terminations occurred outside of California, they are being used for illustrative purposes.
[34] Heather B. Armstrong, Dooce®, http://www.dooce.com/about. (last visited July 29, 2008).

employer's action is based on a legitimate business reason, there is no fundamental public policy that is violated by terminations or adverse employment actions based on such blogs.

Although an employee may feel that the employer has intruded into his or her privacy by reading blog content, particularly if it is unrelated to the employer's business interests, an argument based on the fundamental right to privacy protected by the California Constitution, Article 1, Section 1[35] is likely to fail. California's privacy right is broad and does not require state action,[36] but the courts have held that information posted on the Internet in general cannot be conceived of as private. For example, in *4 Navy Seals v. Associated Press*,[37] the court held that the Navy wife who posted photos in a password-protected account on a photo sharing web site had no reasonable expectation of privacy. Although that case involved an invasion of privacy claim, courts are unlikely to use a different analysis about what constitutes an invasion of privacy when considering a termination by an employer for a blog posting by an employee.[38]

The courts would have to redefine the concept of privacy radically if the constitutional right to privacy were to be relied upon to protect bloggers from adverse employment actions, even if their blog content is purely personal in nature and did not impact the employer's legitimate business interest. Such a radical redefinition would

[35] Cal. Constitution, Art. 1, §1 provides that: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

[36] Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." Porten v. University of S.F., 134 Cal.Rptr. 839, 843 (Ct.App. 1976) (quoting White v. Davis, 533 P.2d 222, 234 (Cal. 1975))

[37] 4 Navy Seals v Associated Press, 413 F.Supp.2d 1136, 1143, (S.D. Cal. 2005).

[38] See also *Konop v. Hawaiian Airlines***,** 302 F.3d 868, (2002), rejecting arguments that accessing a password-protected web site violated the federal Stored Communications Act, 18 U.S.C.A. § 2701(c)(2).

require recognizing that communicating in cyberspace has replaced conversing face-to-face in the living room or even on the telephone for many people, and that the employer should no more be snooping into an employee's blog than peeping into the living room or asking employees to spy on one another.

At least one law review writer has suggested a new statute is needed to protect bloggers from "lifestyle discrimination."[39] Such a statute would further erode California's at-will employment doctrine by adding a restriction on the employer's right to hire and fire as he desires, but such a restriction may be desirable.

The limits to what can be written in a blog should be similar to the limits of speech in any media. Under the current state of California law, discussing purely personal topics in cyberspace can get an employee terminated, as such a termination would not violate a fundamental public policy. That gives an employer unprecedented reach into an employee's life even if there is no legitimate business interest on the part of the employer. In today's wired world, people who once might have gone to church or dinner parties in search of social intercourse, are turning to communications online in search of community. Whatever one's feelings are about this social revolution, an employer should no more be allowed to intrude in that sphere without a legitimate business reason than he should be allowed to inspect one's home at any hour of the day or night.

But blogging per se does not deserve greater protection than other media. There is no reason that disparaging comments about an employer's business or disparaging or discriminatory comments about one's coworkers, which could reasonably subject an employee to discipline if made in person, should be protected merely because they are made in a blog. A balance needs to be found that preserves an employer's legitimate

[39] Hong, *supra* at n. 1, 41 U.S.F. L.Rev 445, 463.

business interests without destroying an employee's right to free expression in nonworking hours. Existing law might be used to find that balance, if privacy were reinterpreted, with the personal blog viewed more as the modern-day equivalent of a casual chat in the kitchen rather than as a periodical aimed at the world. As the web continues to evolve, so must the law.